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NFRAL is a forum for cutting-edge writing and research on arbitration. Our Biweekly Highlights review the latest cases and key developments in arbitration. We draw the material from courts across the country and endeavour to provide you with an accurate gist. Each issue is categorised topic-wise and linked to our [Category Cloud](#).

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APPOINTMENT, SUBSTITUTION AND TERMINATION OF MANDATE OF ARBITRATORS

Standard to test arbitrability, limitation grounds et al in Section 11 case restated: Delhi High Court

17 February 2022 | Vijay Kumar Munjal v. Pawan Munjal and others | Arb. P. No 975 of 2021 | Delhi High Court | Vibhu Bakhru J | SCC OnLine Del 499

The Delhi High Court has restated the standards to deal with the defences raised in applications for appointment of arbitrators. It notes two reasons for which the referral court could *prima facie* examine issues of arbitrability and limitation rather than leaving it for the tribunal. One, so that public and private resources are not wasted by referring an *ex facie* barred dispute. Two, if the existence of arbitration agreement cannot be examined as completely disjunct from the disputes.

However, the court has noted that when examining any issue unless the court is *ex facie* satisfied that the disputes are not arbitrable or otherwise barred by law, parties would be relegated to arbitration. It cited as the test what another single judge of the Delhi High Court held in *NCC Limited v. Indian Oil Corporation Limited* 2019 SCC OnLine Del 6964 and was approved in *Vidya Drolia* (2021) 2 SCC 1: “unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the court concerned hearing [Section 11](#) petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal”. [per Rajiv Shakhder J]

Examining the arbitrability defence, the court rejected the argument that there was dispute as to proprietary rights in trademark that should go to the *persona designata* (the Registrar of Trademarks). In the court’s view a dispute, though involving a right to use a trademark, arose from subordinate rights contained in the parties’ agreement. Moreover, the court said, this was not a case where nonarbitrability was established *ex facie* beyond a vestige of doubt.

Clarifying that its views on all issues were *prima facie*, the court also other arguments.

The court appointed a three member tribunal because the clause had a named arbitrator (known to the parties and hence ineligible under the new law) and the other two were to be appointed jointly by the four persons. Whilst the named arbitrator was appointed, his appointment was, the court held, bad in law because though the agreement was prior to the 2015 Amendments, the amended law required that an agreement in writing to waive the ineligibility created by law. Further, given the disputes, it was not possible for the parties to collectively agree on two names.

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Existence of Arbitration Agreement](#) | [In Rem](#) | [Test of Arbitrability](#) | [Competence Competence](#) | [Arbitrability](#) | [Section 16 ACA](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Who Decides Question](#) | [Validity](#) | [Booz Allen](#) | [Vidya Drolia](#) | [Global Mercantile](#) |

SEAT AND VENUE OF ARBITRATION

Gautam Buddha Nagar is the juridical seat of arbitration and Delhi the convenient venue because courts at the former place have been conferred jurisdiction

17 February 2022 | Hasmukh Prajapati v. Jaiprakash Associates | Matters Under Article 227 No. 67890 of 2021 | Siddharth J | Allahabad High Court | 2021 SCC OnLine All 96

The Allahabad High Court has surveyed the law on the seat-place-venue debate in this case. A student interested in the topic may find the summary set out in the decision helpful (though not necessarily agree with the decision's holding).

An award was challenged in the court at Gautam Buddha Nagar but the award-holder questioned the court's jurisdiction. The court rejected the challenge. The award-holder applied to the High Court under [Article 227 of the Constitution](#).

In the court's view because court at Gautam Buddha Nagar had jurisdiction, it was a significant contrary indicia that the specified venue (Delhi) was not the seat of the arbitration.

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 20 ACA](#) | [Place](#) | [Place of Arbitration](#) | [Seat](#) | [Seat of Arbitration](#) | [Venue](#) | [Venue of Arbitration](#) | [Exclusive Jurisdiction](#) | [Choice of Seat](#) | [Designation of Arbitral Seat](#) | [Tests for Determination of Seat](#) | [BGS Soma](#)

ARBITRATION APPEALS

Procedural orders of tribunal are not orders under Section 17 and hence not appealable under Section 37 ACA: Delhi High Court

16 February 2022 | Randhawa Construction Private Limited v. HCBS Promoters and Developers Private Limited | Arb. A (Comm.) 10 of 2022 | Vibhu Bakhru | 2022 SCC OnLine Del 554

The Delhi High Court has ruled that an arbitral tribunal's order rejecting an application for document disclosure is not appealable under [Section 37 \(2\) \(b\) ACA](#) (under which a tribunal's order under [Section 17 ACA](#) can be challenged). The court considered it "doubtful" whether procedural orders of a tribunal are orders for interim measures under [Section 17 ACA](#). It also stated that [Section 5 ACA](#) limits judicial intervention and no provision of the ACA permitted recourse to courts in respect of procedural orders.

The appeal was also made on another direction of interim measure made by the tribunal.

The procedural order in question

Read the judgment [here](#).

Categories: [Section 37 ACA](#) | [Appealable Orders](#) | [Scope of Appeal Under Section 37 \(2\) \(b\) ACA](#) | [Scope of Appeal Under Section 37 ACA](#) | [Section 17 ACA](#) | [Section 37 \(2\) \(b\) ACA](#) | [Section 37 ACA](#) | [Extent of Judicial Intervention](#) | [Section 5 ACA](#) | [Self Contained Code](#) | [Procedural Orders](#)

ENFORCEMENT AND EXECUTION OF FOREIGN AWARD

Standards to test defences to enforcement of foreign award restated: Bombay High Court

17 February 2022 | Aircon Beibars FZE v. Heligo Charters (P) Ltd. | Commercial Arbitration Petition No. 1130 of 2019 | AK Menon J | Bombay High Court | 2022 SCC OnLine Bom 329

The Bombay High Court has restated the limited grounds on which the court can deny enforcement of a foreign award. In the facts, the court found none of such grounds applied and hence allowed the enforcement of an award for USD 6,563,700 along with a security deposit of USD 975,462.28. The arbitration was seated in Singapore and the award debtor had not applied to the Singapore court to set it aside.

The court's key observations on the limited nature of enforcement-resisting grounds are as follows:

- (a) The ground of patent illegality is not available as a defence to enforcement of a foreign award.
- (b) The following, which could be "corrected as patent illegality", are not relevant in proceedings to enforce a foreign award: (i) finding based on documents taken behind the back of a party or based on no evidence; (ii) jurisdictional errors like where arbitrator wanders outside the contract and deals with matters not referred to him.
- (c) Poor reasoning while ejecting a claim does not attract the public policy ground unless it offends the most basic notion of justice, that is, only in very exceptional circumstances when the conscience of the court is shocked.
- (d) The courts retain discretion to allow enforcement even if a ground set out [Section 48 ACA](#) is made out. However, discretion is not to be exercised where the award reveals a fundamental/structural defect.
- (e) An award may not be enforced where it is predicated on a subject matter outside the jurisdiction of the arbitrator.

The court found that none of the defenses were attracted in the case.

Read the judgment [here](#).

Categories: [Section 48 ACA](#) | [Conditions for Enforcement of Foreign Awards](#) | [Section 48 \(2\) \(b\) ACA](#) | [Recognition and Enforcement of Foreign Award](#) | [Enforcement](#) | [Part II](#) | [Enforcement of Arbitral Awards](#) | [Section 49 ACA](#) | [Enforcement of Foreign Awards](#) | [New York Convention Awards](#) | [Challenge to Foreign Award](#) | [Public Policy](#) | [Public Policy of India](#) | [Most Basic Notions of Morality or Justice](#) | [Fraud in the Making of the Award](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Competence](#) | [Kompetenz](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Ssanyong](#) | [Vijay Karia](#)